92-753

Supreme Court, U.S.
FILED
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GLORIA MATHES,

PETITIONER,

VS.

DONALD B. RICE, SECRETARY,
DEPARTMENT OF THE AIR FORCE

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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COUNSEL OF RECORD

QUESTIONS PRESENTED

1. Whether, for the purpose of tolling the limitations period, the designation of the Comptroller position as "Military Essential" has the continuing discriminatory effect of excluding civilian women from that position?

2. Whether an unrebutted showing that the Air Force failed to follow its own regulations, with regard to designating the Comptroller position as "Military Essential," in order to prevent Petitioner's promotion from Deputy Comptroller to Comptroller precludes a grant of summary judgment?

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OPINIONS BELOW

The United States District Court for the Western District of Oklahoma granted summary judgment on December 11, 1990. (Appendix "C"). On July 22, 1991 the District Court certified a partial appeal of the non-promotion issue pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, and Appeal was taken in the United States Court of Appeals for the Tenth Circuit. (Appendix "B"). Mathes filed her Notice of Appeal with the District Court on August 21, 1991. On July 29, 1992 the Appeals Court affirmed the decision of the District Court. (Appendix "A").

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed is July 29, 1992. The court from which relief is sought is the United

States Court of Appeals for the Tenth Circuit. This Court has jurisdiction pursuant to 28 United States Code § 1254.

STATUTORY PROVISIONS

The statutory regulations involved in this case are 29 C.F.R. § 1613.214 and Air Force Regulation 26-1. The pertinent texts of each are set forth in Appendix "D" and "E" respectively.

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance was a violation of 42 U.S.C. § 2000e et seq.

Petitioner, Gloria Mathes, Appellant below, Plaintiff at trial, (hereinafter referred to as "Mathes" or "Petitioner") is employed by Defendant-Appellee-Respondent, Donald B. Rice, Secretary of the Air Force ("Rice", "the Air Force" or "Respondent") as Deputy Comptroller.

Mathes is a white female civilian employee at Tinker Air Force Base, Oklahoma; and, at the time this action arose, had been in military employment for thirty-one years. From the time of her initial service as a GS-3, she has advanced to a GM-15; and, at the time the cause of action arose, Mathes held the position of Deputy Comptroller for eleven (11) years. During the administrative process in the Equal Employment Opportunity Commission ("EEOC"), Mathes alleged that she was suspended from her employment for fourteen days as a result of sex discrimination and reprisal. Mathes filed an informal complaint of discrimination and reprisal on October 30, 1989 which was processed by the EEOC. Thereafter, on January 24, 1990, Mathes filed a formal complaint of

discrimination wherein, along with the complaints of discriminatory suspension, she also alleged that she had been denied promotion to the position of Comptroller in July, 1989. Mathes also alleged that said non promotion was a continuing violation of Title VII and that as such, the limitations period was tolled. The only matter before this court is Mathes' claim of discriminatory non-promotion.

ARGUMENT

Mathes seeks review of this Court by writ of certiorari on the basis that the United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The courts below failed to determine whether the Air Force's designation of the Comptroller position as "Military

Essential" had a continuing discriminatory effect on it female employees. That determination is crucial to the issues in this case.

PROPOSITION I

MATHES ESTABLISHED THAT THE "MILITARY ESSENTIAL" REQUIREMENT WAS THE CONTINUING POLICY THAT HAD A DISPARATE IMPACT ON WOMEN

In the proceedings below, Mathes contended that the Air Force had a policy which resulted in women not being promoted to the position of Comptroller. Mathes contended that the policy was a continuing violation and as such, the limitations period was tolled. Higgins v. State of Oklahoma, 642 F.2d 1199 (10th Cir. 1981), Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975) and Gray v. Phillips Petroleum Co., 858 F.2d. 610 (1988). Mathes contended that she had made out a prima facie case of sex

discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 63 S.Ct. 1917 (1973) when she proved that, as the Deputy Comptroller for eleven (11) years she was qualified for the Comptroller position; that she was a member of a protected class; and despite her qualifications, she was not selected for the position of Comptroller.

In response to Mathes' prima facie case, the Air Force summarily concluded that the position of Comptroller was "Military Essential." From that, the Air Force concluded that because Mathes was a civilian employee she was not qualified to occupy the Comptroller position. The Air Force submitted that her non-selection to the Comptroller position resulted from her civilian status, not because she was female. Mathes contended

that the Comptroller position is not "Military Essential." That "Military Essential" requirement, and its effect of excluding Mathes as Comptroller is the focus of this Petition.

PROPOSITION II

MATHES' SHOWING THAT THE AIR FORCE VIOLATED ITS OWN REGULATIONS IN ORDER TO PREVENT HER PROMOTION TO COMPTROLLER PRECLUDED A GRANT OF SUMMARY JUDGMENT

Both the district court and the appeals court refused to find a continuing violation. Each reasoned that Mathes only alleged an isolated incident of discrimination which did not rise to the level of a continuing violation. The appeals court affirmed the grant of summary judgment, reasoning that because Mathes did not prove a continuing violation, her complaint of discriminatory non-promotion was

untimely. The district court further reasoned that even if Mathes had showed a continuing violation, summary judgment would nonetheless be appropriate because she could not prove a prima facie case of discrimination because, as a civilian, she could not show that she was qualified under the "Military Essential" requirement proffered by the Air Force. Although Mathes made a compelling argument disputing the "Military Essential" nature of the Comptroller position, the appeals court wholly failed to address same.

PROPOSITION III

MATHES ESTABLISHED GENUINE ISSUE OF MATERIAL FACT REGARDING THE "MILITARY ESSENTIAL" REQUIREMENT

In support of its "Military Essential" contention, the Air Force submitted Air Force Regulation 26-1 (AFR

26-1) with its motion for summary judgment. Additionally the Air Force submitted two affidavits of female Comptrollers. However, even the most cursory reading of AFR 26-1 reveals genuine issue of material fact in four areas that are dispositive to Mathes claim that the policy of "Military Essential" has a disparate impact on women.

First, AFR 26-1 provides that the Deputy Comptroller, Mathes in this case, "assumes full responsibility for the operations" in the absence of the Comptroller. Thus, on one hand she is qualified to hold an alleged "Military Essential" position, but is not qualified to hold such position otherwise. The Air Force provided absolutely no explanation for this contradiction.

Second, under AFR 26-1 the Air Force has a responsibility to review these alleged "Military Essential" positions on April 30th of each year to determine whether or not they are military essential. The Air Force provided absolutely no evidence that it conducted such a review.

Third, according to the express terms of AFR 26-1, "Military Essential" is a label that is placed on positions that have some "combat" status, operation or apperceptiveness. According to AFR 26-1, Chapter, Paragraph 6-7, Subparagraph g, the utilization of "Military Essentiality" is premised upon security as it relates national defense. The affidavit of Ellen B. Mattson, attests that she is a female civilian employee of the United States Air Force

and that her current duty is Comptroller at Maxwell Air Force Base; and, the Air Force acknowledges that there is at least one other installation with a civilian Comptroller. However, the Air Force gave no explanation distinguishing the "military essential" requirement at Tinker Base vs. Maxwell Base. So to the extent that the Air Force baldly asserts that the position of Comptroller is "military essential," Mattson, a civilian comptroller, clearly raised genuine issue of material fact as to that requirement.

Also, in an Air Force affidavit submitted by Major Chris A. Domangue, Chief of Comptroller Officers Assignments, she states that the comptroller position is normally held by an individual in the rank of Major or above. However, this conflicts with the

Maxwell Base assignment of a female civilian to the Comptroller position. Also this conflicts with the fact that Mathes, the Deputy Comptroller, "assumes full responsibility for the operations" in the absence of the Comptroller. Clearly, Mattson's affidavit directly controverts Domangue's affidavit; and again the Air Forces' own documents raise genuine issue of material fact as to whether any position of Comptroller is in fact "military essential."

Fourth, by its own admission, the Air Force has 131 comptroller positions, only six of which are occupied by female military personnel and one female civilian employee. The statistical disparate impact of this policy is apparent under Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849

(1971).

In summary, the Air Force's own documents statistically demonstrate the disparate impact of the purported "military essential policy" and there was overwhelming evidence to find genuine issue of material fact; however, the courts below closed their collective eyes to the evidence which supported Mathes' claims of discriminatory non-promotion.

CONCLUSION AND PRAYER FOR RELIEF

Wherefore premises considered, Appellant respectfully prays that this Honorable Court grant her Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A"

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GLORIA MATHES,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 91-6297
	)	(D.C. No. CIV-90-684-R)
DONALD B. RICE, Secretary, Department of the Air Force,	)	(W.D. Okla.)
	)	
Defendant-Appellee.	)	FILED United States Court of Appeals Tenth Circuit JUL 29 1992 ROBERT L. HOECKER Clerk

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ORDER AND JUDGMENT*[1]

Before MOORE, BARRETT, and BRORBY, Circuit Judges.

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[1] This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir.R. 36.3

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff appeals the district court's Order granting Defendant's motion for summary judgment as to her claim alleging nonpromotion due to sexual discrimination. We affirm.

Plaintiff, a female civilian employee at Tinker Air Force Base, commenced an action in the district court, alleging sex discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17. Specifically, she contended that (1)

she had been suspended as a result of sex discrimination and (2) she was denied promotion from deputy comptroller to the position of comptroller of the base in July, 1989, due to a policy of sex discrimination and her nonpromotion was a continuing violation of Title VII. Defendant filed a motion for summary judgment contending, inter alia, that Plaintiff failed to timely file her failure to promote claim. The district court granted summary judgment on the untimeliness of the nonpromotion claim, determining that Plaintiff failed to bring the claim to the attention of the Equal Employment Opportunity Counselor within thirty days of the date of nonpromotion. In addition, the district court rejected Plaintiff's allegation that the discriminatory conduct

concerning nonpromotion was a continuing violation. The district court entered an Order of Certification Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure permitting this appeal.

Plaintiff appeals from the grant of summary judgment. Our review is de novo, and we apply the same legal standard used by the district court in reviewing the summary judgment motion. See Thomas v. Wichita Coca-Cola Bottling Co., ____ F.2d ____, Nos. 91-1274, 91-1342, slip op. at 4 (10th Cir. July 1, 1992). We will affirm the district court if, viewing the facts in the light most favorable to Plaintiff, there is no genuine issue of material fact and Defendant should prevail as a matter of law. See Millensifer v. Retirement Plan for Salaried Employees of Cotter Corp., ____

F.2d ____, No. 90-1304, slip. op. at 5 (10th Cir. June 26, 1992); see also Fed. R. Civ. P. 56(c).

Plaintiff argues that the district court erred in determining that her failure to promote claim was untimely. The parties agree that the comptroller position was last filled on July 9, 1989. Plaintiff first raised her failure to promote claim on January 24, 1990, when she filed her formal administrative complaint. Thus, Plaintiff did not bring her failure to promote claim to the attention of the Equal Employment Opportunity Counselor within thirty days of the last date the position was filled. See 29 C.F.R. § 1613.214(a)(1)(i); Johnson v. Orr, 747 F.2d 1352, 1357 (10th Cir. 1984); see also Bayer v. United States Dep't of Treasury, 956 F.2d 330,

332 (D.C. Cir. 1992) (timely filing of administrative complaint required before filing Title VII complaint).

Plaintiff argues that Defendant has a continuing policy of not promoting women to the position of comptroller, and, therefore, she could avoid the thirty-day time period and bring this claim as long as the violation continued. The district court rejected this argument. The court stated "Plaintiff has offered no evidence of any women other than herself who have been denied promotion to Comptroller, or of any women other than herself who are qualified to hold the position of Comptroller. . . . Plaintiff's evidence shows one failure to promote one employee to one position on one occasion." Appellant's App. at 77, 78. According to Plaintiff, the district

court misapplied continuing violation law by requiring her to prove that other women have not been promoted in order to show a continuing violation. She further submits that the district court improperly intertwined a continuing violation with disparate impact issues.

Generally, an employee is notified of an adverse employment decision when a particular decision is announced. Gray v. Phillips Petroleum Co., 858 F.2d 610, 614 (10th Cir. 1988). Even after the employment decision, however, the employee may be affected by a continuing policy maintained by the employer that may discriminate against the employee. Id. A discriminatory failure to promote may be a continuing violation under Title VII filing requirements if the plaintiff is alleging nonpromotion over a period of

time. Higgins v. State of Okla. ex rel. Okla. Employment Sec. Comm'n, 642 F.2d 1199, 1200 n.2 (10th Cir. 1981); Rich v. Martin Marietta Corp., 522 F.2d 333, 348 n.15 (10th Cir. 1975). "[D]iscriminatory incidents which occur beyond the limitations period are actionable 'where a plaintiff . . . challenges not just one incident of [unlawful] conduct . . . but an unlawful practice that continues into the limitations period, [in such cases] the complaint is timely when it is filed within [thirty] days of the last asserted occurrence of that practice.'" Haithcock v. Frank, 958 F.2d 671, 677 (6th Cir. 1992) (quoting Havens Realty Corp. v. Coleman, 455 U.S. 363, 380-81 (1982). "Thus, where there is an ongoing, continuous series of discriminatory acts, they may be challenged in their entirety

as long as one of those discriminatory acts falls within the limitations period." Id. Such a continuing violation could toll the thirty-day time period for filing charges. Nealon v. Stone, 958 F.2d 584, 590 n.4 (4th Cir. 1992).

For a continuing violation, however, a plaintiff must allege more than a mere isolated incident of discrimination. Gray, 858 F.2d at 614; EEOC v. Penton Indus. Publishing Co., 851 F.2d 835, 838 (6th Cir. 1988). Plaintiff alleges only an isolated incident of discrimination, which is insufficient to prove a continuing violation. As the district court found, she offered no evidence of women other than herself who allegedly were qualified to be comptroller, but who were denied promotion. Because Plaintiff

failed to present allegations from which a continuing discriminatory policy can be inferred, she failed to prove a continuing violation.

Because she did not prove a continuing violation, Plaintiff did not file a timely discrimination claim. The district court did not err in granting summary judgment for Defendant. Accordingly, the judgment of the United States District Court for the Western District of Oklahoma is AFFIRMED.

Entered for the Court

John P. Moore
Circuit Judge

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

GLORIA MATHES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.
	)	CIV-90-684-R
DONALD B. RICE,	)	
Secretary, Department of	)	
the Air Force,	)	
	)	
Defendant.	)	

FILED
JUL 22 1991

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY_____, DEPUTY

ORDER OF CERTIFICATION PURSUANT TO RULE 54(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE

I. BACKGROUND

The Plaintiff is a civilian employee of the United States Air Force at Tinker Air Force Base. In her complaint filed April 30, 1990, Plaintiff alleged that she had been discriminated against on the

basis of sex when she received a fourteen day suspension and that the Air Force had a discriminatory policy of non-promotion of its female employees to the position of Comptroller. Plaintiff also claimed that said failure to promote constituted a continuing violation under Gray v. Phillips Petroleum Co., 858 F.2d 610 (10th Cir. 1988); Higgins v. Oklahoma ex rel Oklahoma Employment Security Commission, 642 F.2d 1199 (10th Cir. 1981); and Rich v. Martin Marietta Corp., 622 F.2d 333 (10th Cir. 1975), which obviated the need for Plaintiff to contact the Equal Employment Opportunity Commission within 30 days of the alleged discriminatory event as required by 29 CFR 1613.214.

On July 9, 1990 Defendant Rice moved for summary judgment only on Plaintiff's claim of discriminatory non-promotion.

Thus, the only remaining issue left to be tried is the issue of the 14 day suspension;;[sic] and Plaintiff takes the position that the summary judgment effectively disposed of the gravamen of her cause of action.

II. APPROPRIATENESS OF RULE 54(b) CERTIFICATION

Rule 54(b) permits Certification of multiple claims of judgments only upon determination that there is no just reason for delay; and, that determination is left to the discretion of this Court. For reasons herein cited, this Court determines that there is no just reason for delay and hereby enters final judgment on Plaintiff's claim of discriminatory non-promotion.

III. DISPOSITION OF REMAINING CLAIMS

The 14 day suspension is the only issue remaining and the Court hereby Administratively closes this case; and,

the Plaintiff is granted permission to reopen her 14 day suspension claim after disposition of her appeal.

DATED this _____ day of July, 1991.

_____
DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

APPROVED:

/s/_____
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APPENDIX "C"

IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT
OKLAHOMA

GLORIA MATHES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIV 90-684-R
	)	
DONALD B. RICE, Secretary, Department of the Air Force,	)	
	)	
Defendant.	)	

ORDER

Before the Court is the Defendant's Motion to Dismiss or, In the Alternative, For Summary Judgment.

I. Background

The Plaintiff is a civilian employee of the United States Air Force, at Tinker Air Force Base. The Plaintiff complains that she was suspended from her employment for fourteen days as a "result of sex discrimination and

reprisal." The Plaintiff was notified of her suspension on October 3, 1989; the suspension became effective October 8, 1989. The Plaintiff filed a formal grievance with the Base's personnel division on October 30, 1989. On November 3, 1989, the Chief of the Equal Employment Opportunity Complaints Office ("EEOC") acknowledged receipt of the grievance, and notified the Plaintiff that the grievance had been forwarded to his office for processing.

On January 24, 1990, the Plaintiff filed a formal administrative complaint with the EEOC. In her formal administrative complaint, the Plaintiff alleged for the first time that she had been denied promotion from her position as Deputy Comptroller to the position of Comptroller of the Oklahoma City Air

Logistics Center. The last time a vacancy occurred in the Comptroller's position was July 9, 1989.

II. Timeliness of Plaintiff's Title VII Complaint

The Defendant seeks summary judgment on the Plaintiff's Title VII Complaint on the ground that it was untimely filed. The parties agree that the applicable time limitation is found in 29 C.F.R. 1613.214, and that the applicable time period is thirty (30) days.

A. Discriminatory Suspension Claim

The Defendant's argument that the Plaintiff's complaint was untimely is premised upon two assumptions. First, the Defendant assumes that the Plaintiff's time period begun to run when she was notified of her suspension. Second, the Defendant assumes that the Plaintiff could satisfy the

administrative time limits only by complaining directly to the appropriate EEOC official, and not by sending a complaint to another official who, in turn, forwarded it to the appropriate EEOC official within the thirty day time period.

First, the Court notes that an allegation of discrimination must be "brought to the attention of the Equal Employment Opportunity Counselor...within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action...." 29 C.F.R. 1613.214(a)(i). The Plaintiff's suspension became

effective on October 8, 1989. She was therefore, required to bring any discrimination complaint based on the suspension no later than November 7, 1989.

Furthermore, the Court notes that the Plaintiff filed a formal grievance with her employer's personnel division on October 30, 1989. In her formal grievance, the Plaintiff alleged that her suspension had resulted from sex discrimination. On November 3, 1989, the Chief of the Equal Employment Opportunity Complaint Office sent the Plaintiff a letter notifying her that her grievance had been forwarded to his office for processing. It is clear that the Plaintiff's grievance was "brought to the attention of" the EEOC counselor when it was received by the EEOC counselor.

The Defendant argues that although the EEOC counselor received the Plaintiff's grievance within the requisite 30 day time period, the grievance did not satisfy the Plaintiff's obligation to contact an EEOC counselor within thirty (30) days because the grievance was sent to the EEOC counselor by the personnel office rather than the Plaintiff. This argument is without merit. The applicable agency regulation provides that an initial EEOC complaint "shall be deemed filed on the date it is received if delivered to an appropriate official..." 29 C.F.R. 1613.214(a)(ii)(3). The Plaintiff's initial administrative complaint to the EEOC counselor was deemed filed when it was received by the EEOC counselor on November 3, 1989, less than 30 days after

the alleged discriminatory personnel action which became effective on October 8, 1989.

The grievance clearly brought to the attention of the EEOC counselor the matter which caused the Plaintiff to believe that she had been discriminated against. The fact that it was delivered to the EEOC counselor by the personnel office rather than the Plaintiff is of no consequence.

B. Failure to Promote Claim

The Defendant also challenges the timeliness of the Plaintiff's initial contact with the EEOC with respect to the Plaintiff's failure to promote claim. The Plaintiff complains that she has been discriminated against in that she has not been promoted from her current position of Deputy Comptroller to the

position of Comptroller of the Oklahoma City Air Logistics Center. It is undisputed that the last vacancy in the position of Comptroller of the Oklahoma City Air Logistics Center was filled on July 9, 1989.

The Plaintiff did not raise her failure to promote claim within thirty days of the last date she could have been promoted, or at any time during the EEOC administrative proceedings, until she filed her formal administrative complaint on January 24, 1990. The Defendant argues that the Plaintiff's failure to promote claim is time barred because she failed to bring it to the attention of the EEOC counselor within thirty days after the last date she could have been promoted July 9, 1989. See 29 C.F.R. 1613.214(a)(1). The Plaintiff has

submitted and Affidavit which alleges that the failure to the position of Comptroller was the result of an ongoing Air Force policy of not promotion women to the position of Comptroller. The Plaintiff characterizes this "policy" as a continuing violation, which may be remedied at any time as long as it continues. This allegation is not supported by any evidence. The Plaintiff has offered no evidence of any women other than herself who have been denied promotion to Comptroller, or of any women other than herself who are qualified to hold the position of Comptroller. The bald, conclusory statement in Plaintiff's Affidavit is not enough to show that the Air Force has a policy of not promoting women to the position of Comptroller. Luckett v.

Bethlehem Steel Corp., 618 F.2d 1373 (10th Cir. 1980); Pure Gold, Inc. v. Syntex, Inc., 739 F.2d 624 (Fed.Cir. 1984).

Longstanding discriminatory practices may be challenged under a "continuing violation" theory under appropriate circumstances. Courts have allowed employees to file with the EEOC alleging continuing violations, even though an employee may have been affected much earlier by an adverse employment decision, and the limitation period from that date may have already run. Gray v. Phillips Petroleum Co., 858 F.2d 610 (10th Cir. 1988; Higgins v. Oklahoma ex rel Oklahoma Employment Security Commission, 642 F.2d 1199 (10th Cir. 1981). Repeated, discriminatory refusals to promote an employee to various

positions for which he is qualified may amount to a continuing violation. Higgins v. State of Oklahoma, ex rel. Okla.Emp.Sec.Comm., 642 F.2d 1199 (10th Cir. 1981). A systematic policy of employment discrimination by which members of certain racial groups are continually discriminated against may amount to a continuing violation. Williams v. Owens-Illinois, Inc., 665 F.2d 918 (9th Cir. 1982); Rich v. Martin-Marietta Corp., 522 F.2d 333 (10th Cir. 1975). An isolated act of discrimination, on the other hand, does not amount to a continuing violation. Odeck v. Hamilton Federal Savings & Loan Ass'n, 551 F.2d 1136 (8th Cir. 1977); Bartmess v. Drewrey's USA, Inc., 444 F.2d 1186 (7th Cir. 1977).

The Plaintiff's evidence in this

case does not show a continuing violation. At most, the Plaintiff's evidence shows one failure to promote one employee to one position on one occasion. This can in no way be described as a "continuing violation." Despite the conclusory assertion in the Plaintiff's Affidavit, this does not amount to an ongoing policy of discrimination.

The Plaintiff was required to bring her failure to promote claim to the attention of the EEOC Counselor within thirty days of the date on which "she knew or reasonably should have known" of the basis for her claim. Since the position the Plaintiff sought was filled on July 9, 1989, she should have known of the basis for her claim by that time. The Plaintiff was required to bring her failure to promote claim to the attention

of the EEOC counselor by August 8, 1989. The Plaintiff didn't complain of the Defendant's failure to promote her until she filed her formal complaint with the EEOC on until (sic) January 24, 1990. The Plaintiff's failure to promote claim is clearly time-barred. 29 C.F.R. 1613.214(a)(i)[1]

The Defendant also argues that Plaintiff has not produced evidence sufficient to make a prima facie case of discriminatory failure to promote. From the Plaintiff's evidence, it may be inferred that she is female, that she was not promoted to the position of Comptroller, and that the position was

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[1]Since the Court finds the Plaintiff's failure to promote claim to be time-barred, the Court does not address the issue of whether the Plaintiff has waived this claim by failing to raise it in her initial complaint with the EEOC.

filled by a male. The Defendant argues that it had a legitimate reason for placing someone other than the Plaintiff in the position of comptroller. The Defendant's evidence shows that the Air Force has designated the position of Comptroller as "Military Essential," and that Air Force policy dictates hat the position be filled by a military officer. Aside from the conclusory statement in the Plaintiff's Affidavit indication that this policy "results in women being excluded from the position of Comptroller," the plaintiff does not refute this evidence. The Plaintiff offers no evidence to indicate that she satisfies the requirements of the position as defined by the policy; that the policy is a mere pretext; or that the policy has an unfair disparate impact on

women. Thus, even if the Plaintiff's failure to promote claim had been timely, the Defendant would be entitled to summary judgment on that claim since the Plaintiff has failed to produce evidence to refute the Defendant's evidence.

The Defendant is **GRANTED** summary judgment with respect to the Plaintiff's failure to promote claims. The Defendant's Motion to Dismiss, or, in the Alternative, for Summary Judgment is **DENIED** in all other respects.[2]

IT IS SO ORDERED this 11th day of December, 1990.

/s/

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[2] The Plaintiff has objected to the use of certain communications between her counsel and EEOC officials. Some of these communications are relevant to the issue of when certain claims were asserted. To the extent that these communications are irrelevant, they have not been considered in the Court's ruling.

DAVID L. RUSSELL
UNITED STATES DISTRICT
JUDGE

APPENDIX "D"

29 C.F.R. § 1613.214

Filing and presentation of complaint.

(a) Time limits. (1) An agency shall require that a complaint be submitted in writing by the complainant or representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if-

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against with 30 calendar days of the date of the alleged

discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; and

(ii) The complainant or representative submitted the written complaint to an appropriate official within 15 calendar days after the receipt of the notice of the right to file a complaint.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall

transmit it to the Director of the Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with paragraph (a)(3) of this section.

(3) A complaint shall be deemed filed on the date it is received, if delivered to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complaints. The agency shall acknowledge, in writing, to the complainant or representative receipt of the complaint and advise the complainant in writing of all administrative rights and of the right to file a civil action as set forth in §1613.281, including the time limits imposed upon the exercise of these rights.

APPENDIX "E"

Air Force Regulation 26-1
Chapter 6
Utilization of Military Manpower

Section A- Manpower Mix Decision

6-1 General Information. Air Force workloads may be performed by one of three types of manpower: military personnel, in-service civilian employees, or by contract services. The Department of Defense (DOD) requires that military personnel only be assigned to positions that directly contribute to prosecution of war (combat or direct combat support), are required by law, are military to custom or tradition, or are needed for overseas rotation. Other workloads, considered indirect combat support, should be performed by in-service civilian employees or contract services

(AFR 26-1), volume I). Servicing manpower activities should determine the military essentiality of each manpower authorization individually and properly code it in the Manpower Data System (MDS). Manpower activities at all levels should adhere closely to military essentiality policies and procedures when establishing new manpower positions and when considering current manpower positions for conversion. Review the military essentiality of a position upon major mission or duty changes, and when changes occur in the UAF data of the position. Use the manpower determination process outlined in this chapter, to determine the best manpower mix. Throughout this chapter, the term major command (MAJCOM) includes separate operation agencies (SOA) and direct

reporting units (DRU).

6-2 Responsibilities. The Director. Manpower and Organization (HQ USAF/PRM), is the Air Staff office of primary responsibility (OPR) for military essentiality issues and is responsible for ensuring MAJCOMs follow DOD policies and procedures when identifying manpower positions as military essential. MAJCOM Directors of Manpower and ORganization (M&O), through their Command Management Engineering Teams (CMET), will ensure military essentiality policies and procedures are according to Air Force guidelines.

6-3. Manpower Mix. Military essentiality is the driving force in determining the Air Force manpower mix. In-service civilian employees or contract services should perform workloads not requiring

military personnel to the maximum extent possible.

a. MAJCOM and servicing manpower activities will not add military authorizations to work centers when civilian authorizations have been deleted, as the result of a civilian reduction in force (RIF).

b. MAJCOMs must not add overage military personnel to a work center under this RIF condition, if the functions formerly performed by in-service civilian employees must still be performed.

c. Functional managers may give tasks comprising the abolished positions to residual assigned military or civilian personnel with the activity affected.

d. If a currently authorized civilian position has been determined and

identified as military essential, convert the civilian authorization to military, through attrition, unless mission requirements dictate a faster conversion.

e. Coordinate all actions that will result in converting military authorizations to civilian, or acquiring an alternate source contract service in functions affecting Air Force Reserve or Air National Guard forces training, with Headquarters, Air Force Reserve or National Guard Bureau.

f. Attachment 1 and tables 6-1 through 6-3 describe the manpower mix decision process.

6-4. Determining Military Essentiality. The Military Essentiality Status (MES) Coding Program manages military essentiality. MAJCOM manpower activities will review each manpower position to

identify those that are military essential and will code them in the Command Manpower Data System (CMDS). The Wartime Critical Military Skills (WCMS) and Unsatisfactory Rotation Index (URI) Programs (paragraphs 6-8 and 6-21) are two key programs which support the MES program.

Section B- Military Essentiality Status (MES) Coding Program

6-5. Program Objective. The MES Coding program helps determine workloads that military personnel should perform and helps identify positions associated with these workloads as military essential in the MDS. The MES Coding Program identifies military essentiality categories and provides criteria for manpower activities and functional managers when determining manpower

authorizations' military essentiality. On authorizations meeting these criteria will be identified as military essential.

6-6. Responsibilities. HQ USAF/PRM is the OPR for the MES Coding Program. MAJCOM Directors of M&O, through their CMET's, will ensure commands manage their programs according to Air Force policies and procedures. Manpower activities must rely on CCPOs, and unit and functional managers to properly apply the military essentiality criteria. Coordinate all actions involving civilian manpower authorizations with the servicing Central Civilian Personnel Office (CCPO).

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6.7f MAJCOMs must review their positions no later than 30 April of each year to ensure the coding is current and

consistent with military essentiality criteria.

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6-7g. Manpower activates will use these MES codes and criteria to code manpower authorizations in the UAF.

(1) Code A. A position which, under any condition, includes a requirement to accomplish tasks in a combat capacity or direct support capacity (tables 6-4, 6-5, and 6-6)

(a) Combat positions are those requiring the incumbent to be directly engaged in combat (hostile) operations in either and offensive or defensive capacity.

1. A combat position requires a military member to employ ordnance (tactical or strategic) or to physically engage hostile forces either in the air,

on land or at sea.